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No. 07-1274

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IN THE

Supreme Court of the United States

ARTHUR CROSS, a/k/a SKIP CROSS,

Petitioner,

v.

RELIANCE STANDARD
LIFE INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Fifth Circuit's Decision is consistent with the analysis of this Court in *Black & Decker Disability Plan v. Nord* and where the decision does not conflict with a decision from any Court of Appeals.

II. Whether Petitioner has presented compelling reasons to grant the Petition and consolidate this case with *Metropolitan Life Insurance Company v. Glenn*, where this denial of disability benefits under an ERISA benefit plan cannot be considered wrong under any standard of review because the claimant acknowledges that he can physically perform the requirements of his job, he applied for similar positions with other companies at the time he claims he became disabled, he identified his problem at work as having "a very adversarial supervisor" and two independent specialists concluded that he is not totally disabled.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Reliance Standard Life Insurance Company has the following parent corporation:

> Reliance Standard Life Insurance Company of Texas

Reliance Standard Life Insurance Company identifies the following as a publicly held company that owns 10% or more of Reliance Standard Life Insurance Company's stock:

> Delphi Financial Group, Inc. owns the stock of Reliance Standard Life Insurance Company of Texas, which in turn owns the stock of Reliance Standard Life Insurance Company.

Diversified Foods and Seasonings, Inc. identifies its parent corporation and a publicly held company that owns 10% or more of its stock as follows:

> Al Copeland Investments, Inc.

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INTRODUCTION

The Petition for a Writ of Certiorari filed by Mr. Cross fails to present "compelling reasons" which would justify review by this Court of the Court of Appeals unpublished decision. Contrary to the arguments in the Petition, the judgment against Mr. Cross was not the result of the lower courts' failure to follow the law or even the standard of review that was applied. The decision was compelled by the facts of this claim and the governing Plan language.

The dispute in this case is over eligibility for long term disability benefits under an ERISA plan. The Petition first argues that the Fifth Circuit's Decision against Mr. Cross is inconsistent with this Court's holding in *Black & Decker Disability Plan v. Nord*, regarding the weight to be given the opinion of a treating physician. Mr. Cross further suggests that there is a split in the Circuits on this issue. Mr. Cross' arguments lack a foundation of truth. Throughout his Petition, Mr. Cross argues that Reliance Standard did not address or refute the opinions of his doctors. The facts as set forth below prove otherwise.

Mr. Cross initially claimed that he was eligible for benefits because he was physically unable to continue working. However, Mr. Cross now concedes that he was physically capable of continuing to work. Mr. Cross now claims that he is disabled as a result of the potential affects of job stress on his health. However, at the same time he was claiming disability, Mr. Cross was applying for positions with other employers. When asked about this inconsistency by Reliance Standard, Mr. Cross

stated that he was looking for less stressful positions, however, all of the position are identical to the one he left. Now, Mr. Cross argues to this Court that he stopped his job search in early June, before he claims that he became disabled. Again, the facts prove otherwise.

In rejecting the disability claim, Reliance Standard based its decision on the results of objective medical tests, the opinions of two independent doctors and the fact that Mr. Cross looked for other work after complaining about an adversarial supervisor at his job. Because the denial of benefits is based on reliable evidence, the Fifth Circuit's Decision in favor of Reliance Standard is entirely consistent with the Court's holding in *Black & Decker Disability Plan v. Nord*. Also, there is no split in the Circuits regarding the interpretation of *Nord* as argued by the Petitioner. Therefore, there is also no compelling reason why this Court should re-visit an issue that was fully explained just a few years ago.

Contrary to the decision in *Black & Decker Disability Plan v. Nord*, Mr. Cross also asks this Court in his Petition to adopt a presumption that job stress can always be a basis for a disability claim. This is not a legal issue suitable for a Petition. It involves a question of fact that must be examined in the context of an individual claim. What is the specific diagnosis? Who is offering the opinion, a hired expert? Is the person offering the opinion a specialist? What support was given for the opinion, if any? In this case, the opinion relied on by Mr. Cross came from a hired expert who is not a specialist and whose report provides the barest of details and no explanation for the opinions. The decision of the Fifth Circuit was based on the facts, not a question of law.

Finally, Mr. Cross urges consolidation of this appeal with *Metropolitan Life Insurance Company v. Glenn*, No. 06-923. In *Glenn*, the Court is asked to determine the affect of a plan fiduciary's conflict of interest on the judicial standard of review. Mr. Cross argues that the Fifth Circuit did not properly weigh Reliance Standard's conflict of interest when it affirmed the denial of benefits. He is wrong. The Fifth Circuit recognized that as plan insurer and decision-maker, Reliance Standard was operating under a conflict of interest and it weighed the conflict as a factor in deciding whether the Plan's decision was arbitrary and capricious.

The Fifth Circuit correctly rejected many of the arguments raised by Mr. Cross regarding a conflict of interest. Mr. Cross persists in making many of these same arguments to this Court. For example, Mr. Cross argues as evidence of a conflict of interest that Reliance Standard did not send all of his medical records to a doctor who it asked to review the claim. The record confirms that those documents were sent. In fact, Mr. Cross conceded in his Reply Brief to the Fifth Circuit that he was wrong on this point. There are numerous other examples of inaccurate statements by Mr. Cross in his briefs to the Fifth Circuit as well as in his Petition to this Court.

In a case such as this one, the conflict of interest makes no difference at all to the result. A conflict of interest cannot make a "right" decision arbitrary and capricious. While a conflict of interest may tilt the scales in favor of the claimant when the decision is a close call, this is not such a case. Therefore, consolidation with *Glenn* is not appropriate and the decision of the Fifth Circuit should stand.

The Petition of Mr. Cross fails to present compelling reasons why it should be granted. The Fifth Circuit's decision against Mr. Cross was not the result of a misapplication of the law. Instead, it was based on the facts of his claim. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. *The Claim for Benefits*

At the time Mr. Cross stopped working, he was covered under his employer's welfare benefit plan. Reliance Standard insured the Plan's long term disability program and is the Claims Administrator for the disability Plan. To be eligible for benefits under the Plan, a claimant must be unable to perform the material duties of his regular occupation for a minimum of 90 consecutive days. (AR 148, 151).[1] Mr. Cross claims that he became disabled on June 25, 2004.

At the same time that Mr. Cross claims that he became totally disabled, he was actively seeking employment with other companies. (AR 109-128). Mr. Cross began sending out resumes on April 21, 2004. (AR 109-110). He continued to submit resumes through June 2004, including re-sending several resumes on

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[1] The AR references in this Brief are to the documents in the Administrative Record, which are the materials considered by Reliance Standard when it made its decisions on the claim. These materials were filed in the District Court under civil docket item 18. Mr. Cross' Petition also references these documents, but he refers to them as "RA."

June 25, 2004, the day that he claims he could no longer work. (AR 111-112).

While the disability claim was pending, Reliance Standard asked Mr. Cross about his job search. Mr. Cross responded that the jobs he applied for were less stressful than the position he left. (AR 27). This statement is not true. As acknowledged by Mr. Cross on page 4 of his Petition, he was "seeking the same job with another company." Mr. Cross now argues, however, that he stopped sending resumes on June 7, 2004, when he saw a doctor about physical complaints. This statement is also not true. Mr. Cross sent a final resume to a prospective employer on June 22, 2004. (AR 124). He also forwarded some of the previously submitted resumes to someone on June 25, 2004. (AR 111-122). There would be no reason for him to re-send the resumes if he was no longer actively seeking employment.

On June 7, 2004, Mr. Cross last saw a doctor prior to claiming disability. (AR 458). While some symptoms such as fatigue were noted, there was no indication by his doctor that his symptoms had increased or became disabling. The only change noted in the report was that Mr. Cross complained of being "up against a very adversarial supervisor." (AR 458). Of note, Mr. Cross did not see a doctor again until July 26, 2004, more than one month after he stopped working. (AR 267). During that visit, Mr. Cross told the doctor that he was able to walk one and a half miles in 35 minutes. (AR 267). With the exception of a follow up visit on August 4, 2004, Mr. Cross did not see a doctor again until December 7, 2004. (AR 43). Thus, during the 90 day Elimination

Period, when a claimant must be continuously totally disabled, Mr. Cross saw a doctor only two times.

In his Statement of the Case, Mr. Cross refers to a cardiac test that was performed on January 21, 2004. As with other records that he cites to in his Petition, he omits many of the relevant findings. Mr. Cross' blood pressure response to the stress test was normal. (AR 282). He had normal ventricular function with an ejection fraction of 60 percent. The testing was also electrocardiographically negative for ischemia.

Follow-up testing was performed on March 4, 2004.[2] Mr. Cross states that this testing was "borderline positive for myocardial ischemia." See Petition at page 4. This is not entirely accurate. The report actually states "clinically borderline positive for myocardial ischemia *versus deconditioning*." (AR 284). Mr. Cross also fails to state the primary conclusion from the testing of "fair exercise tolerance." He omits the conclusion that the testing was "scintigraphically negative without evidence of stress induced myocardial ischemia," in contrast to the earlier testing which he cites to this Court. Nor does he mention the normal blood pressure response, that he achieved 9.4 METS of activity, and 90 percent of maximum predicted heart rate. (AR 284).

Mr. Cross now claims that physically he could have continued to work but stopped doing so because of

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[2] Mr. Cross refers to this testing as taking place "three months prior to retirement." See Petition at page 4. Throughout his Petition, Mr. Cross refers to June 25, 2004 as his "retirement" date. The Reliance Standard Policy provides disability benefits, not retirement benefits.

potential problems from job stress on his heart condition. See Petition at page 31. This was not the original basis for the disability claim. On page 5 of the Petition, Mr. Cross quotes verbatim from a June 23, 2004 report from his treating doctor. Contrary to the current claim, the doctor stated that Mr. Cross was then physically disabled. (AR 457). In fact, the term "job stress" does not appear at all in the report.

To further evaluate the disability claim, Reliance Standard sent the medical records to Marvin Goldstein, M.D., a Cardiologist. After summarizing the medical records, Dr. Goldstein concluded that Mr. Cross has the ability to work at a light duty occupation, such as his own occupation. (AR 256). Dr. Goldstein based his opinion on the results of the March 4, 2004 stress test. Dr. Goldstein further noted the absence of cardiac changes in June 2004 when Mr. Cross stopped working. Once again referencing the exercise tests, Dr. Goldstein stated that there was no evidence that Mr. Cross exceeded his physical capabilities. Accordingly, Dr. Goldstein concluded that he was not totally disabled.

Based on the medical records, including the report of Dr. Goldstein, Reliance Standard denied Mr. Cross' claim for disability benefits on September 24, 2004. (AR 75-79). On November 8, 2004, Mr. Cross administratively appealed the claim denial. (AR 64). Mr. Cross subsequently withdrew that appeal in order to have additional time to submit records to Reliance Standard prior to a final decision on the claim. (AR 57). Thereafter, Mr. Cross retained an attorney to represent him, an appeal was again requested, and updated medical records were provided to Reliance Standard. (AR 20).

II. *The Administrative Appeal*

According to the administrative appeal documents, despite claiming disability, Mr. Cross did not treat with a doctor for four months between August 4, and December 7, 2004. (AR 43). Also, after he stopped working, Mr. Cross moved to North Carolina to be near his sons and family. (AR 26). In a Declaration submitted with the appeal, Mr. Cross again stated that a "big reason" for his inability to work was the physical requirements of the job – a position he has now abandoned. (AR 26). Mr. Cross also claimed that the stress and pressure of his job affected his medical condition. (AR 26).

On March 3, 2005, Mr. Cross' Cardiologist in North Carolina, Richard Jacoby, M.D., prepared a report in connection with the disability claim. (AR 30). While Dr. Jacoby mentioned certain complaints being made by Mr. Cross, he did not directly state that Mr. Cross was totally disabled. He simply stated that these complaints "would make meaningful employment difficult." (AR 30). Dr. Jacoby made no mention of job stress as a cause of the disability. Moreover, Dr. Jacoby did not treat Mr. Cross until after the 90 day Elimination Period ended and he failed to offer an opinion on his condition during that relevant time.

Dr. Jacoby's March 3, 2005 report also failed to mention a Cardiolite study that was performed on Mr. Cross on January 7, 2005. According to Dr. Jacoby's report from the study, it "was negative with 10 METS of exercise performed." (AR 37). Based on these results, Dr. Jacoby stated prior to March 3, 2005 that it was "safe [for Mr. Cross] to increase his activity." (AR 37).

Through his attorney, Mr. Cross also submitted to Reliance Standard a peer review from William Porter, M.D. (AR 9). Dr. Porter is not a Cardiologist. (AR 11-13). He is Board Certified in Hematology and Internal Medicine. (AR 13). Nor did Dr. Porter identify in his report the medical records that he reviewed before reaching his opinions. (AR 9). Dr. Porter acknowledged that Mr. Cross had a "normal graded exercise test," but stated an opinion that Mr. Cross was nevertheless disabled because of the "adverse effects on the symptoms and progression of coronary artery disease" due to job stress. (AR 10).

The report of Dr. Porter, along with the other medical records, were sent to Jeffrey Caren, M.D., a Cardiologist, for review and comment. (AR 251-254). Contrary to Mr. Cross' statement in his Petition that the opinions of Dr. Porter are "unrefuted," Dr. Caren stated that in patients with obstructive coronary artery disease, there is less than a one percent probability of a coronary event during the following 24 months after a negative Cardiolite study. (AR 253). Based on the functional testing, Dr. Caren concluded that Mr. Cross is "capable working at a light occupation." (AR 254). Therefore, he was not totally disabled.

After considering all of the medical evidence, Reliance Standard notified Mr. Cross on June 16, 2005 that the decision to deny the claim for benefits was upheld. (AR 2-7). The final decision letter identified in detail the medical records that were considered and explained why they did not support the claim for benefits. The letter also referred to the fact that Mr. Cross was applying for jobs with other companies at the time he

claimed that he became disabled. Also, contrary to his statement to Reliance Standard that these were less stressful positions, Reliance Standard pointed out that the positions were identical to the one he previously held. Based on this evidence, Reliance Standard concluded that Mr. Cross failed to sustain his burden of proving that he was totally disabled.

III. *The District Court Decision*

After the final denial of benefits by Reliance Standard, Mr. Cross filed suit under ERISA against the Plan Sponsor and Reliance Standard. Both sides moved for summary judgment and, on April 20, 2007, the District Court entered judgment in favor of the Plan defendants. Mr. Cross timely appealed that decision to the Fifth Circuit.

IV. *The Fifth Circuit Decision*

In an unpublished decision, the Fifth Circuit affirmed the District Court's entry of judgment in favor of Respondents. Because there is language in the Plan that grants to Reliance Standard discretionary authority, the Court reviewed the denial of benefits for abuse of discretion. See Decision at page 6. However, the Fifth Circuit recognized that because Reliance Standard is both the insurer and the decision-maker "it operates under a conflict of interest because it 'potentially benefits from every denied claim.'" See Decision at page 6. Therefore, the Fifth Circuit held that the greater the evidence of a conflict of interest, the less deference it would give to Reliance Standard.

The Fifth Circuit correctly rejected as erroneous many of examples of a conflict claimed by Mr. Cross. For example, as Mr. Cross continues to argue to this Court, he argued to the Fifth Circuit that reliance by the Plan on the report of Dr. Goldstein is evidence of a conflict because the doctor was not provided with all of the treatment records. As stated by Fifth Circuit, "[Mr.] Cross concedes in his reply brief that he was factually incorrect in his original brief in asserting that Goldstein was not provided with the previous opinions of Dr. Sotolongo and Kusnick." See Decision at page 7. Yet he continues to make this admittedly erroneous argument with respect to Dr. Goldstein.

Mr. Cross also argued to the Fifth Circuit that it was evidence of a conflict that Reliance Standard accepted the opinions of Drs. Goldstein and Caren over the opinions of his treating doctors. The Fifth Circuit disagreed, noting that Drs. Goldstein and Caren based their opinions on the objective testing. See Decision at pages 7-8. The Fifth Circuit further concluded that Reliance Standard's rejection of job stress as a basis for the disability claim was not indicative of a conflict of interest because: (a) Mr. Cross applied for similar positions with other companies at the time he stopped working; (b) his blood pressure remained constant and under control both before and after he stopped working; and (c) Mr. Cross only complained about the stress of his specific job based on the adversarial relationship with his supervisor, and not stress from the occupation in general. See Decision at pages 8-9. After considering the true facts and the relevant law, the Fifth Circuit concluded that "Reliance's conclusions were reasonable

and not the result of a conflict of interest." See Decision at pages 9-10. Accordingly, the judgment of the District Court was affirmed.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Decision is Consistent with *Black & Decker Disability Plan v. Nord*

The decision of the Fifth Circuit does not conflict with the decision of any other Court of Appeals concerning the amount of deference owed to the decision-maker when it refuses to accept the opinions of a treating physician. More important, the decision below does not conflict with this Court's decision on that subject in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003). As such, Mr. Cross has not presented "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

In *Nord*, the Supreme Court held that the "treating physician rule" cannot be applied in ERISA cases.[3] The Court explained the holding in *Nord* as follows:

> Plan administrators, of course, may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician, but, we hold, courts have no warrant to require administrators automatically to accord special weight to the

[3] The treating physician rule applies in Social Security disability cases and generally requires that more weight is given to the opinions of the treating doctors. *Nord*, 538 U.S. at 829.

> opinions of a claimant's physician; nor may courts impose on plan administrators a discreet burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation.

Nord, 538 U.S. at 834.

A. There is No Split in the Circuits over the Meaning of *Nord* and the Fifth Circuit Correctly Concluded that the Denial was Based on Reliable Evidence that Mr. Cross was not Totally Disabled

Mr. Cross suggests that a split in the Circuits exists because, unlike other Circuits, the Fifth Circuit allows a plan fiduciary to ignore a treating physician's opinions and reject them "without specifying cause, or at best, for indefensible reasons." See Petition at page 12. The Fifth Circuit has made no such pronouncement either in this case or any other decision. Nor can it be disputed that if a treating physician's opinion is entirely ignored or a claimant's *reliable* evidence is not given credit, a plan's decision is arbitrary and capricious. *Id.* Those facts do not exist here, however.

The Fifth Circuit's decision in this case does not conflict *Nord*. Nor has Mr. Cross presented any reason why this Court should re-visit the subject of that decision It is evident from his Petition that Mr. Cross simply disagrees with the Fifth Circuit's decision. This does not provide a proper basis for seeking further review by this Court. Equally problematic for Mr. Cross are the numerous misstatements of the underlying facts that are repeated throughout his Petition.

1. *Neither Reliance Standard nor the Fifth Circuit Ignored the Opinions of Mr. Cross' Experts*

In his Petition, Mr. Cross argues that the opinions of his treating doctors were ignored or rejected without Reliance Standard specifying a reason. Clearly, the opinions of Mr. Cross' doctors were not ignored as they were specifically addressed by Drs. Goldstein and Caren and discussed at length in the decision letters. (AR 2-7, 230-233, 254-258). As recognized by the Fifth Circuit, it was reasonable of Reliance Standard to accept the opinions of Drs. Goldstein and Caren over the opinions of the treating doctors because they were based on the objective medical testing and Mr. Cross' own actions in seeking similar positions indicated that *he* did not believe that occupational stress was dangerous to his health. See Decision at pages 8-9.

Dr. Goldstein specifically addressed the opinion of treating physician Dr. Kusnick, who stated that Mr. Cross was disabled in June 2004. In support of his opinion that Mr. Cross could perform light duty work, Dr. Goldstein referred to the March 4, 2004 exercise test in which Mr. Cross performed at 9.4 METS. (AR 256). Dr. Goldstein explained that this capacity translates into an occupational limit of 3.76 METS, which satisfies the demands of a light duty occupation. Dr. Goldstein further commented that there was no evidence of any change in Mr. Cross' condition at or around June 2004 when he stopped working. (AR 256).

Dr. Caren prepared his report at the request of Reliance Standard on April 26, 2005, during the

administrative appeal and after additional medical records were submitted by Mr. Cross. (AR 230). Dr. Caren identified all of the treatment records that he considered, provided a summary of them and then explained why he disagreed with the opinions relied on by Mr. Cross. (AR 230-231). Citing to the March 4, 2004 stress test, Dr. Caren noted that Mr. Cross had average functional capacity for his age. (AR 23). Dr. Caren also responded to the argument first raised by Dr. Porter during the appeal that Mr. Cross was disabled because of the effects of job stress on his future health. Dr. Caren stated that based on the Cardiolite testing, Mr. Cross had a low risk profile for a coronary event during the following twenty-four months. (AR 231-232).

It is worth comparing the detailed reports by Drs. Goldstein and Caren with the opinions relied on by Mr. Cross.[4] Mr. Cross first relies on the June 23, 2004 report from Dr. Kusnick. Dr. Kusnick stated that Mr. Cross was in physical decline and had an increase in objective symptoms. (AR 457). In contrast, the most recent stress test revealed fair exercise tolerance, an ejection fraction of 55% with no wall motion abnormalities and a normal blood pressure response. (AR 284). Nor did the sparse treatment notes around the time Mr. Cross stopped working document any increase in symptoms.

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[4] Mr. Cross argues in his Petition that it was arbitrary and capricious for Reliance Standard to obtain these medical reviews after it received a report from a Nurse. It cannot be wrong to obtain opinions from specialists, especially when the claimant subsequently provides updated medical records and a new opinion from an expert.

Next, Mr. Cross relies on a March 3, 2005 report from Dr. Jacoby. Dr. Jacoby only described Mr. Cross' condition in March 2005, and not in very much detail. (AR 30). Dr. Jacoby offered no opinion on whether Mr. Cross was totally disabled for 90 consecutive days after June 25, 2004, the standard under the Plan. Nor did Dr. Jacoby even state with certainty that Mr. Cross was disabled in March 2005. He only stated that his claimed limitations "would make meaningful employment difficult." (AR 30).

Significantly, while Mr. Cross accuses Reliance Standard of disregarding the opinions of Drs. Kusnick and Jacoby, it is he who has now abandoned them. Dr. Kusnick offered an opinion that Mr. Cross was physically unable to work in June 2004. (AR 457). Read liberally, Dr. Jacoby believed that Mr. Cross was physically disabled at some point. (AR 30). Mr. Cross no longer bases his claim on those opinions. Mr. Cross concedes "that he could have physically performed the requirements of his job" after he stopped working. See Petition at pages 19-20.

Mr. Cross argues on page 19 of his Petition that "the essential basis for his disability is the stress associated with his position" and that this is the finding of the treating Cardiologists. This was obviously not the opinion of Dr. Kusnick or Dr. Jacoby. It is only Dr. Porter who espoused this opinion and he is not a Cardiologist.

Relying on a report by Dr. Porter, Mr. Cross argued to Reliance Standard that job related stress would adversely affect his medical condition and was the cause of his claimed disability. (AR 9-10). Unlike the detailed

reports of Drs. Goldstein and Caren, Dr. Porter did not identify any of the medical records he reviewed to arrive at his opinion. (AR 9-10). Dr. Porter did not explain how the objective testing supported his opinion. He also failed to identify any support in any medical journal for his opinion that job stress can adversely affect the progression of Mr. Cross' specific medical condition.

The reports of Drs. Goldstein and Caren provided Reliance Standard with "reliable evidence" that contradicted the medical opinions relied on by Mr. Cross. *See Nord*, 538 U.S. at 834. Therefore, there is no basis for the argument on page 19 of the Petition and elsewhere that the opinions of his three doctors "are unrefuted by any medical source" or were ignored. In the final decision letter, Reliance Standard discussed at length the records and opinions of Mr. Cross' experts. (AR 3-4). Addressing Dr. Porter's opinion that job stress would make it more difficult to control his hypertension, Reliance Standard cited to the treatment records which showed that Mr. Cross' blood pressure remained relatively constant both during the time and after he stopped working. (AR 4). Reliance Standard also referred to the results of the March 4, 2004 stress test, which showed an average functional capacity for his age, and the opinion of Dr. Caren based on that testing that Mr. Cross had a low risk profile for a future cardiac event. (AR 4).

Reliance Standard also explained in its decision letter that the claim of disability based on job stress was inconsistent with his application for similar jobs with other companies. (AR 5). Responding to Mr. Cross' statement that the other positions were "lighter or less

stressful" than his current occupation, Reliance Standard noted that they were in fact identical occupations, a position that Mr. Cross now does not dispute. (AR 5). Based on the above, it is quite a stretch for Mr. Cross to argue in his Petition that Reliance Standard's decision offered no reasons and that the opinions of his doctors are not refuted. Having cited to reliable evidence in the record, Reliance Standard had no duty to further explain why it disagreed with the opinions of the treating physicians. *Nord*, 538 U.S. at 834.

B. Mr. Cross Waived any Argument that the Fifth Circuit Did Not Consider All of the Factors Identified in *Nord* by Failing to Raise The Issue In the Lower Courts

In this section of his Petition, as he does elsewhere, Mr. Cross simply quotes from various cases, without explaining how these decisions support his extraordinary request that this Court grant Certiorari. This is especially true of his discussion of *Nord* on page 15 of the Petition. Mr. Cross quotes from that portion of the decision in which the Court observed that a doctor who is repeatedly retained by a plan may have an incentive to find that a claimant is not disabled so that the doctor is retained in future cases. *See Nord*, 538 U.S. at 832. The Court identified other factors that may be considered when a court weighs conflicting medical opinions such as the length of the relationship with the patient and relative expertise of the physicians. Mr. Cross had the opportunity to present evidence on these subjects to both the District Court and the Court of Appeals but failed to do so. It is too late to raise these

issues for the first time in a Petition for a Writ of Certiorari. *Glover v. United States*, 531 U.S. 198, 205 (2001).

Even if Mr. Cross did not waive these arguments as he did, the evidence that is in the Administrative Record on these subjects does not support any of the arguments being made by Mr. Cross. There is no evidence that Dr. Caren provided a medical opinion to Reliance Standard other than the one on this claim. It is also noteworthy that Reliance Standard did not directly retain Dr. Caren. He was hired by an outside consultant. (AR 251). Looking to the doctors' credentials, unlike Drs. Goldstein and Caren, Dr. Porter is not a Cardiologist. (AR 13). He is a Hematologist and Internist. These facts demonstrate that Reliance Standard's rejection of Dr. Porter's opinions is consistent with *Nord*.

Review of the concluding paragraph in this section of the Petition shows that Mr. Cross is not raising an issue that warrants further review by this Court. He simply disagrees with the conclusion reached by the Fifth Circuit. In arguing that his doctors' opinions were never considered or refuted by Reliance Standard, Mr. Cross ignores the decision letters issued by Reliance Standard, the detailed reports prepared by Drs. Caren and Goldstein as well as his own basis for claiming benefits. Therefore, the first basis for the Petition should be rejected.

II. The Presumption of Disability Advocated by Petitioner Is Contrary to the Holding in *Nord* and Ignores the Varying Facts in Individual Claims

In the next section of his Petition, Mr. Cross asks the Court to adopt a rule recognizing job stress as a basis for an ERISA disability claim. See Petition at page 25. While no one would dispute that a condition such as a coma would automatically render a person disabled, a cardiac condition is quite different. There are many different types of heart conditions and varying levels of disease. There is no medical support in this record for a *per se* rule as advocated by Mr. Cross. As in *Nord*, this is an attempt to place an unwarranted presumption in an ERISA claim.

A. The Fifth Circuit Rejected Mr. Cross' Argument For Coverage Based on the Facts, not the Law

Contrary to Mr. Cross' argument, the Fifth Circuit did not reject out of hand the possibility that a claimant could be totally disabled based on the potential effects of stress on a medical condition. The Fifth Circuit only concluded that Mr. Cross failed to prove his claim for benefits on this basis. After considering the evidence in the Administrative Record, the Fifth Circuit concluded that Reliance Standard's rejection of Mr. Cross' claim based on job stress was not the result of a conflict of interest, nor was it arbitrary and capricious. See Decision at pages 8-9. The Court identified several facts supporting this conclusion. See Decision at pages 8-9. First, the Court agreed with Dr. Goldstein that the stress tests provided objective criteria to evaluate

Mr. Cross' cardiac condition. Also, contrary to Dr. Porter's opinion that job stress had an adverse effect on Mr. Cross' hypertension, there was no change in his blood pressure after he stopped working. Next, the Fifth Circuit observed that the only job stress complained of by Mr. Cross was specific to his job and concerned his supervisor whereas the Plan provides a benefit in the event of a disability from a claimant's "occupation," not his specific job. Further supporting the Court's conclusion that any stress was specific to his job, the Court observed that Mr. Cross sought similar positions with other employers at the time he stopped working.

In an earlier decision by the Fifth Circuit, the Court also rejected a disability claim based on job stress, but this was also based on the facts presented. *See Gooden v. Provident Life & Acc. Ins. Co.*, 253 F.3d 329 (5th Cir. 2001). There are many common facts shared by Mr. Cross and the claimant in *Gooden*. The most recent stress test performed on Mr. Gooden was within normal limits. His treating doctor failed to identify any change in his condition at the time he stopped working. Similar to the evidence in this claim that Mr. Cross continued to look for other work, the claimant in *Gooden* was laid off before he submitted his claim. Mr. Gooden also argued that the Plan "failed to appreciate" his doctor's concern for the effects of job stress. Based on the objective testing and the facts surrounding the claim, the Fifth Circuit concluded that the denial of benefits was not an abuse of discretion. Nowhere in *Gooden* did the Fifth Circuit state that a claim based on job stress can never succeed. As in this case, the Court only held that the claimant failed to sustain his burden of proof.

Even the case relied on by Mr. Cross in his Petition demonstrates that a *per se* rule should not be applied and each claim for benefits must be decided on its own set of facts. In support of his argument, Mr. Cross primarily relies on and quotes extensively from the District Court decision in *Lasser v. Reliance Standard Life Ins. Co.*, 146 F.Supp. 2d 619 (N.J. 2001).[5] In *Lasser*, the defense expert did not address the issue of occupational stress. The claimant also presented evidence that for his particular heart condition, which differs from Mr. Cross' condition, stress posed a real risk of harm. Therefore, while job stress may have been a legitimate concern in *Lasser*, there is no such evidence in the claim of Mr. Cross.

In this section of his Petition, Mr. Cross again argues in error that his doctors' opinions regarding the effects of stress were neither addressed nor refuted by Reliance Standard. See Petition at page 32. Plato is quoted as having said that "there is no harm in repeating a good thing."[6] However, repeating a falsehood will not make it either true or good. The numerous times that Mr. Cross repeats his mistake simply reinforces the Petition's lack of merit.

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[5] *Lasser* pre-dates this Court's decision in *Nord*. This same is true of the other cases relied on by Mr. Cross on page 30 of his Petition.

[6] The Columbia World of Quotations (Columbia University Press, 1996), available at *www.Bartleby.com\br.66.html* (last visited May 21, 2008).

B. Petitioner Relies on Improper Evidence in the Petition

Mr. Cross attempts to bolster his arguments regarding job stress by referring this Court to a 2007 medical journal article and the affidavit he submitted to this Court. Obviously, this evidence was not before Reliance Standard when it made its decision on the claim years earlier. A denial of benefits cannot be considered arbitrary and capricious for not considering evidence that was never before the Plan. It is for this reason that the Fifth Circuit and every other Circuit has held that a Court's review is limited to the administrative record when the deferential standard of review applies. *See Vega v. Nat'l Life Ins. Servs. Inc.*, 188 F.3d 287, 299 (5th Cir. 1999). *See also Orndorf v. Paul Revere Life Ins. Co.*, 404 F.3d 510, 518 (1st Cir. 2005); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995); *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 440 (3d Cir. 1997); *Elliott v. Sarah Lee Corp.*, 190 F.3d 601, 608 (4th Cir. 1999); *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990); *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975 (7th Cir. 1999); *Maune v. I.B.E.W., Local No. 1, Health & Welfare Fund*, 83 F.3d 959, 963 (8th Cir. 1996); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006); *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 823-24 (10th Cir. 1996); *Jett v. Blue Cross & Blue Shield of Ala.*, 890 F.2d 1137 (11th Cir. 1990). Based on this law, the new evidence relied on by Mr. Cross cannot be considered.

III. The Conflict of Interest Analysis by the Lower Courts Did Not Determine the Result – the Facts Led to the Decisions Against Coverage

Mr. Cross would like to get another bite at the apple before the District Court. For this reason, he argues that his Petition should be consolidated with *Metropolitan Life v. Glenn,* a case in which the Court is considering the effect of a conflict of interest on the standard of review in ERISA cases and in which the Court heard oral argument on April 23, 2008.[7] For many reasons, consolidation with *Glenn* is unwarranted.

Mr. Cross concedes in his Petition that the Plan grants to Reliance Standard discretionary authority to determine eligibility for benefits. This language is plainly stated in the Plan documents.[8] However, because Reliance Standard both insures the Plan and is responsible for making benefit decisions, the Fifth Circuit recognized that it "potentially benefits from every denied claim." See Decision at page 6. Accordingly, the Fifth Circuit gave less deference to Reliance Standard's decision and considered other evidence of a conflict of interest raised by Mr. Cross when deciding the amount of deference owed to Reliance Standard. See Decision at pages 6-7. While the Fifth Circuit rejected many of the arguments raised by Mr. Cross,

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[7] No. 06-923.

[8] "Reliance Standard Life Insurance Company shall serve as the claims review fiduciary with respect to the insurance policy and the Plan. The claims review fiduciary has the discretionary authority to interpret the Plan and the insurance policy and to determine eligibility for benefits." (AR 155).

this was because they were contrary to the facts, not because the Court failed to take into consideration any conflict on the part of Reliance Standard.

A. The Fifth Circuit Properly Weighed Any Conflict as a Factor in Deciding Whether the Denial of Benefits Was Arbitrary and Capricious

Mr. Cross identifies his evidence of a conflict on page 34 of his Petition. There are good reasons for the rejection of these arguments by the Fifth Circuit. Mr. Cross argues that Reliance Standard failed to provide Dr. Goldstein with records from Dr. Sotolongo. However, he admitted in the Fifth Circuit briefing that this statement was wrong as those records are clearly identified in Dr. Goldstein's report. (AR 255). He accuses Drs. Goldstein and Caren of inaccurately describing the March 2004 stress test as "negative." Dr. Goldstein was quoting directly from the report when he stated that the test was "negative without evidence of stress induced myocardial ischemia" (AR 255, 284).[9] Dr. Caren also did not describe the March 4, 2004 stress test as "negative" as claimed by Mr. Cross. He described the testing as showing "an average functional capacity for age, with symptoms at peak exercise." (AR 254). This accurately summarizes the test report conclusions. (AR 284). The criticism by Mr. Cross of the doctors' choice of words is also curious based on his own doctor's statement that the January 7, 2005 stress test "showed a normal ejection fraction and no wall motion abnormalities." (AR 9).

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[9] This testing also contradicts the argument by Mr. Cross that the evidence "actually supports a limitation to sedentary work."

Without citing to any source, Mr. Cross next argues that Reliance Standard told the doctors who reviewed the medical records at its request "the functional capacity required to deny benefits." While Reliance Standard asked the doctors if the medical records supported an impairment from light duty work, how else could the doctors comment on the question of disability if they did not know the exertional level required of Mr. Cross' occupation? (AR 260). Mr. Cross also ignores another question that was posed by Reliance Standard. Reliance Standard asked whether Mr. Cross "[could] have been working beyond his means given his medical condition." (AR 260). This can hardly be considered a leading question.

In this section of his Petition, Mr. Cross returns to his erroneous argument that Reliance Standard never addressed his claim based on job stress. Clearly, it would have been wrong, let alone arbitrary and capricious, for Reliance Standard not to address a claim that is raised. However, the record demonstrates that Dr. Caren considered the issue of job stress after it was raised for the first time by Dr. Porter, and it was also fully addressed by Reliance Standard in its final decision letter. (AR 4-6, 253-254).

Contrary to what Mr. Cross would have this Court believe, the denial of benefits by Reliance Standard had nothing to do with a conflict of interest. Nor was the outcome of this case in the District Court or the Fifth Circuit determined by the standard of review. The facts led to the undeniable conclusion that Mr. Cross was not totally disabled. Originally, Mr. Cross claimed that he was physically unable to continue working past June 25,

2004. He now admits that he was physically able to continue working in June 2004. During the appeal, Mr. Cross claimed for the first time that his disability was based on job stress. Why, then, did he apply for other similar jobs through the time he stopped working? And for all of his criticism of the Cardiologists who reviewed the records at the request of Reliance Standard, he ignores the fact that he relies on a non-examining doctor who is not a specialist in his condition, he does not identify any of the records on which he relied and he provides absolutely no support for his opinions. Under these facts, it is difficult to imagine how any decision in *Glenn* can alter the outcome here.

CONCLUSION

The Petition of Mr. Cross fails to establish any compelling reasons why this Court should grant Certiorari. Therefore, it is respectfully requested that the Petition be denied.

Respectfully submitted,

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